

Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek

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SUMMARY

This book is a study of the development of the idea of recodification in the Netherlands since 1838 and, more particularly, of the origins and elaboration of the new Civil Code, on which professor E.M. Meijers began work in 1947. In the Netherlands the origins of the Civil Code of 1838 have been studied intensively, but a comprehensive account of the efforts to rejuvenate the existing legislation in the field of private law has been lacking up to now. Many lawyers are to a certain extent acquainted with the latest developments in codification; however, their knowledge is rather fragmentary and not always accurate.

The research strategy adopted in this study primarily regards the investigation and analysis of legal periodicals and of parliamentary debates about the budget in the nineteenth and early twentieth century, which have hardly been explored before. With regard to the origins of the new Civil Code extensive use has been made of the archives of the Ministry of Justice, as well as of a large number of interviews with people who worked on the recodification or were otherwise involved with it.

After an account of the aims, methods and design of this study in the first chapter, a sketch of the history of the recodification of Dutch private law between 1838 and 1938 is given in chapter 2. In the next chapters the origins and development of the new Civil Code are described.

Chapter 3 deals extensively with Meijers' role in the recodification process, describing his working methods and attitude towards the project, his chairmanship of the Royal Commission for the Legislation of Private Law, his relation with the Ministry of Justice and its successive ministers. The role of the Lower House is also investigated, especially in respect to the debate about the outlines and politically sensitive aspects of the new Code.

In chapter 4 this description and analysis has been continued with regard to the Triumvirate which succeeded Meijers in 1954. Mention is made of the gradually expanding organization of the project, differences in the views about the project, the diminishing authority of the drafters, as well as the personal relations between them. Attention has also been paid to the question in which respect the texts of Books 5 and 6 of the new Civil Code, drafted by the Triumvirate, can be considered a continuation of Meijers' work. This chapter ends with the dissolution of the Triumvirate in 1961.

Chapter 5 focuses on Meijers' most important successor, professor J. Drion, who worked with O. van Ewijk of the Ministry of Justice on the memorandum of reply of the new law of inheritance from 1961 to 1964. Attention has also been paid to the three government commissioners who worked on the project after Drion's untimely death in 1964: professor K. Wiersma for Book 4 (law of inheritance), professor J.H. Beekhuis for Book 5 (property law) and professor G.E. Langemeijer for Books 3 and 6 (the general part of the law of obligations).

Chapter 6 describes the troubled history of the new law of inheritance. Emphasis has been placed on the role of the notarial profession as a lobby group and on the influence of its most prominent spokesmen, in relation to the role and authority of the drafters. An important aspect of this story is the debate about the legal position of the surviving spouse in the case of inheritance by testament, which problem the States-

General have been reluctant to solve for more than fifty years, due to a lack of knowledge and interest.

Chapter 7 reports on the development of Books 3, 5 and 6 after 1964. For the analysis of the legislative process of Book 3 special attention has been paid to the history of Chapter 3.1.1 (General provisions), focusing on the attitudes of the drafters about and the organization of the project. With regard to Book 5 the account centred on the relation of the government commissioner with the Ministry of Justice, especially in respect to the lack of supervision. The study of Book 6 compares the work of government commissioner W. Snijders with the work of the Triumvirate with respect to the use of comparative law, the handling of criticism and the discussion with practicing lawyers. Separate attention has been paid to the legislative process after 1976, when the Lower House had to decide about these Books.

Chapter 8 offers a sketch of the development of the first draft of Book 7 (Special contracts), dealing with Meijers' aims with this Book, the role of the Triumvirate and the contributions of the people who have been assigned with the task to complete this part of the Code since 1961. The chapter concludes with a global comparison of a couple of titles in Meijers' draft with the bill as it was finally sent to the Lower House.

In chapter 9 the development of the new law of transport together with the law on the means of transportation has been described, arguing that the link between these fields of law affected the legislative project. The role of government commissioner H. Schadee has also been highlighted, as well as the importance of his ongoing discussion with practicing jurists.

Chapter 10 deals with the law of intellectual property. Although it was planned to be laid down in Book 9 of the new Civil Code, a draft has never been published.

Finally, chapter 11 shows the difficulties which accompanied the implementation of Books 3, 5 and 6 of the new Civil Code from 1980 to 1992. Special attention has been given to the role of the standing parliamentary committee for Justice, which longed to get rid of the matter, the hesitance of the practicing lawyers to get acquainted with the multitude of imminent changes, the steadily growing influence of legal science, as well as the relative importance of the fact that a long succession of governments and parties had supported the drafting of the new Code, or at least had not opposed it.

From this study can be concluded that the old Civil Code has faced a stiff opposition from the beginning. Originally the criticism focused especially on the language and system of the Code, later the fact that the legislator did not keep pace with developments in society was considered more important.

Politicians did not want to hear of revision in the first decades after the adoption of the Civil Code, except for a small number of cases in which a pressing social need had to be countered. This situation was caused by the time-consuming parliamentary procedures and the frequent changes of government, which resulted in the fact that only bills that could be passed within one parliamentary year stood a chance to be taken into consideration. Only in the rare case that a minister was determined to try his utmost, a revision of the Civil Code could be brought about.

In the first decade of this century the interest of government and Parliament in legislation in the field of private law was at its lowest. Attempts of a number of Royal

Commissions to instigate a general revision fell on deaf ears. A partial revision was almost out of the question since 1879, as the respective Royal Commissions were all officially set up to prepare a general revision.

This disintegration of the idea of codification led to a shift of attention to judicial law-making, similar to earlier developments in France. In 1913 a start was made with systematically publishing and annotating case law; in 1919 the Dutch Supreme Court handed down its opinion in the case *Lindenbaum/Cohen*, which recognized judge-made law as a source of law on the same level as statutory rules. For a time the shift of attention diminished the urgency of recodification, but it did not make it unnecessary, as judicial law-making has its drawbacks, especially if it has to develop in connection with an existing code.

E.M. Meijers, professor of private law in Leyden, was one of the first people to draw attention to this fact, but his repeated pleas for a general revision were not heeded by the legislator. At last in 1947 a decision was made to draft a new Civil Code, probably due to the influence of the Minister of Justice, J.H. van Maarseveen, who was personally interested in the project. This shows that, though many people argued for the necessity of recodification for a long time, the actual decision depended on factors like the person of the Minister of Justice, experiences with earlier attempts at revision, the role of tradition and the availability of alternative ways of law-making.

Another conclusion which can be drawn of this study is that a recodification does not necessarily have to take a long time. Considering the maturity of Meijers' drafts at the time of his death and their close affiliation with the law of the day, it can be argued that the new Civil Code could have been published in the *Bulletin of Acts and Degrees* before 1960 if Meijers had been able to finish his work in time. That 1960 proved to be too early, is due to a number of causes. In the first place the number of people working on the project increased steadily, until the early 1970's when government commissioner Snijders became almost the sole figure in charge of the recodification. An arrangement like a triumvirate or a number of government commissioners creates large and often unsurmountable coordination problems, as the drafting of Books 6 and 7 shows. Another drawback is that compromises abound, which impair the expressiveness of the text and diminish its chances to be approved by the community of academic and practicing lawyers. Traces of this can be found in the original bill for Book 6, as well as the memorandum of reply and the memorandum of amendment of Book 3, especially when compared with the revised bill for Book 6, which was prepared by one man.

In the second place it is necessary for a project like the new Civil Code that it is headed by a strong leader with an open mind towards the wishes and ideas of practicing lawyers. Meijers and Snijders were leaders in this sense. However, when the project is prepared in a commission, the tendency will be to limit external contacts, especially when the personal relations between the members of the commission are strained. This had been the case with the Triumvirate, as well as with the people who worked on the law of inheritance (Book 4) from 1954 to 1974. Direct contact with the notarial profession would have prevented a large amount of parliamentary debate.

A third explanation for the long time spent on the new Civil Code is the lack of interest of the responsible ministers. Because of that the drafters indulged too much in their specialistic interests and perfectionistic attitude. Preparing the codification too

thoroughly leads to an increase of problems and the separation of the project with its original aims. Besides, the developments in society do not come to a halt in the mean time. The work on the new law of inheritance and on the revision of the law of transport illustrates this point.

It can also be argued that the abundant opportunities to consider the drafts can tempt Parliament to leave its mark to a larger degree than desirable on at least a couple of articles in the Code. Ideally speaking, the discussion between the Ministry of Justice and the legal community about a technical subject like the revision of property law should not be conducted in such a way that Parliament acts as a transmitter between the two. This happened to be the case, however, and because of a lack of interest and expertise Members of Parliament became increasingly dissatisfied with the project.

A general comment can be that the temptation of perfectionism worked out negatively. Perfect law does not exist, although striving for quality keeps the idea of codification alive and inspires legal science. This study shows that Meijers' work is only in minor respects different from the work of his successors; in terms of social impact the differences are almost irrelevant. Another general lesson can be that it would have been better for the support of the project if more people had been involved with it. Meijers was able to discuss his plans with the leading writers on private law, so that any criticism reached him in an early stage. His handling of criticism led in its turn to a certain commitment of these writers to the project and fewer criticism afterwards. The criticism in later years, however, came too often at the wrong moment, when changes were more difficult to make.